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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., et al,

Petitioners,

v.

DAVID M. BARRY, et al,

Respondents.

BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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By consent of the petitioners and the respondents the Portland Retail Druggists Association, Inc. files this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Portland Retail Druggists Association, Inc. ("PRDA") is an Oregon nonprofit corporation composed of owners and operators of community pharmacies in the Portland area of Oregon and elsewhere in the United States.

The PRDA was the partially prevailing respondent in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1 (1976), which construed the 15 U.S.C. § 13c nonprofit institutions exemption to the Robinson-Patman Act, 15 U.S.C. §§ 13, et seq.

It seeks to represent the public interest in the practice of pharmacy.

This Court's decision in the case at bar will affect an antitrust case in which the PRDA is the plaintiff: Portland Retail Druggists Association, Inc. v. Kaiser Foundation Health Plan, Inc., et al., USDC CD Cal., Civil No.

77-1458-IH.

On January 23, 1978, said complaint was dismissed from the bench by the Hon. Irving Hill, U.S. District Judge, on the ground, among others, that the Kaiser defendants were exempt from the antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the Act").

Judge Hill also dismissed on the same date the companion case of De Modena, etc., et al. v. Kaiser Foundation Health Plan, Inc., et al., USDC CD Cal., Civil No. 77-0005-IH.

The PRDA believes that the First Circuit decision before this Court is a correct statement of the law and that decisions to the contrary in other circuits are based on an erroneous and incomplete analysis of the Act and the legislative record.

The PRDA submits that if petitioners prevail, they and other insurance and

health care providers will have a license to boycott, coerce and intimidate to the injury of competition and the general public.

QUESTION PRESENTED

Is a regulated insurance company that engages in acts of boycott, coercion or intimidation subject to the federal antitrust laws, 15 U.S.C. §§ 1, et seq., pursuant to the 15 U.S.C. § 1013(b) exemption to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015?

The subsidiary question is whether the 15 U.S.C. § 1013(b) exemption is limited to insurance company boycotts of their agents.

SUMMARY OF ARGUMENT

Statutory exemptions to the antitrust laws are to be strictly construed, and this rule applies to the McCarran-Ferguson Act.

The line of authority relied on by petitioners and industry amici originated with dictum in the first reported decision and was followed without independent analysis in later decisions cited by petitioners.

The weight of reason, authority and the legislative history is that the 15 U.S.C. § 1013(b) boycott exception to the McCarran-Ferguson Act is broader than a mere insurance company boycott of its agents, and includes the boycott complained of by respondents.

Petitioner's good motives or intent are not a defense to violation of the antitrust laws.

With exceptions, the McCarran-Ferguson Act exempts insurance companies from the federal antitrust laws.

15 U.S.C. § 1013(b) of the Act lists the exceptions:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The antitrust laws are to be construed liberally and exemptions from their application are to be construed strictly against the claimed exemption. Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11 (1976).

As an exemption from the application of the federal antitrust laws, the Act is to be construed strictly against any claimed immunity.

Various of the decisions relied upon by the petitioners (pet.br. 16-18) did not apply the strict construction rule.

Instead, often the reverse occurred.

The clear and unambiguous language of 15 U.S.C. § 1013(b) was construed to impotence, contrary to legislative intent.

The line of authority relied upon by petitioners originated with dictum in the first reported case to deal with the boycott issue: Transnational Insurance Co. v. Rosenlund, 261 F.Supp. 12, 27 (D.Ore. 1966):

> "Entirely aside from the legislative history of the Act, and assuming that the exception is applicable to the arena in which we are working, there is absolutely nothing in this record which would indicate a boycott, coercion or intimidation.***"

The court in Transnational had the benefit only of one out-of-context statement by Rep. Celler. The trial court file confirms that the court in Transnational was not cited to other parts of the legislative record.

Thus, on the basis of one statement during the congressional debates on the Act, and without reference to the whole legislative record, Transnational ignored the clear and unambiguous language of 15 U.S.C. § 1013(b).

Then courts in other cases cited by petitioners followed Transnational blindly and without independent analysis of the legislative history, assuming arguendo 15 U.S.C. § 1013(b) is ambiguous.

Transnational and the later cases that relied on Transnational should be rejected by this Court on the basis that there is no need to resort to legislative history when the statute is unambiguous, and if deemed ambiguous, 15 U.S.C. § 1013(b) is to be given its clear legislative intent: the McCarran-Ferguson Act does not protect boycott, coercion or intimidation.

The weight of reason and authority is that the 15 U.S.C. § 1013(b) exception is broader than a mere insurance company boycott of its agents.

Monarch Life Insurance Company v. Loyal Protective Life Insurance Company, 326 F2d 841, 846 (2d Cir. 1964), cert. denied, 376 U.S. 952 (1964), held that all insurance company boycotts or agreements to boycott condemned by the Sherman Act are subject to federal law, and a private treble-damage action is available to parties who are injured by such boycott or agreement to boycott.

Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F2d 1075, 1078 (4th Cir. 1976) held that the McCarran-Ferguson Act does not exempt an alleged group boycott of chiropractors by regulated insurance companies.

The most recent decision appears to be Royal Drug Company, Inc. v. Group

Life and Health Ins. Co., 556 F2d 1375 (5th Cir. 1977 which, inter alia, rejected a narrow view of § 1013(b).

Because the Sherman Act is much more comprehensive than § 1013(b), affirming the First Circuit would not bring virtually every Sherman Act claim within § 1013(b).

The Sherman Act includes conspiracy, combination, attempt to monopolize and monopolization, none of which are listed in § 1013(b).

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The National Association of Insurance Commissioners, the American Insurance Association, The Alliance of American Insurers, and the National Association of Independent Insurers have moved for leave to file briefs amici curiae.

The industry amici contend that the insurance industry acts in the public

interest and that affirmance of the First Circuit would be unfortunate.

Good motives or intent are not a defense to violation of the antitrust laws. United States v. Topco Associates, Inc., 405 U.S. 596, 610-611 (1972); Albrecht v. Herald Company, 390 U.S. 145, 154 (1964).

Royal Drug Company, Inc. v. Group Life and Health Ins. Co., supra, at 556 F2d 1386-1387 rejected the "justification" defense:

> " * * * Whether such economic coercion is proper is not for a court to decide. It is a matter of national policy which has been addressed by the Congress, from which any change will originate * * *. We apply the law as presently determined by the Congress and we hold that the antitrust laws are applicable to the arrangements challenged herein."

CONCLUSION

The First Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS on the counsel for petitioners, respondents and amici curiae by enclosing a copy thereof in an envelope, postage prepaid, and depositing the same in the United States mails at Portland, Oregon on February 10, 1978, addressed to those listed below, and further certify that all parties required to be served have been served:

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